Supreme Court of the United States

NO. 354

PETITIONERS REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

NO. 334

LOCAL UNION NO. 12405, DISTRICT 50, UNITED MINE WORKERS; JOSEPH J. PIUNTI, *et al.*,

Petitioners,

vs.

MARTIN MARIETTA CORPORATION; DISTRICT 50, UNITED MINE WORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONERS' REPLY BRIEF

Petitioners seek certiorari not only because of the plight of the particular participants involved herein but because the situation with respect to arbitration in the Seventh Circuit requires the supervision of this Court. On June 30, 1964, in *Piano and Musical Instrument Workers, Local 2549 v. W. W. Kimball Company*, 333 F. 2d 761 (1964), *cert.*

applied for, App. Docket No. 535, October term, 1964, the Seventh Circuit held that the question of reemployment rights of employees under a collective bargaining agreement was not arbitrable where the Company transferred the location of its plant during the term of the agreement but did not resume actual production with new employees until nine days after the contract's expiration. The only variance between the instant case and *Kimball* is that while *Kimball* waited until nine days following the expiration of the agreement to open its new doors, here everything occurred during the term of the contract—a contract which provided that work be performed only by employees in the bargaining unit. In both cases the Seventh Circuit, contrary to the dictates of *Steelworkers* v. *American Manufacturing Company*, 363 U. S. 564, 568 (1960), resolved the merits of the grievance and interposed its judgment as to the equities of the dispute. The district court held in the instant matter that although Respondent Company transferred its operation to its other plants during the term of the agreement it "did not breach the Wage Agreement . . ." (App. 254). And this the Court of Appeals affirmed along with the district court's finding that the "subject matter of the grievance . . . was not covered by any of the terms of the Wage Agreement" (App. 254). Yet, the collective bargaining agreement provided that any "differences" or "any local trouble of any kind" as to the "meaning and application" of the contract would be resolved in arbitration. And this same agreement contained extensive provisions concerning seniority, provided for the maintenance of the *status quo* during the term of the agreement in the event of any differences and required that work be performed only by employees in the bargaining unit.

Clearly, within the dictates of *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964) the subject matter of the

dispute is arbitrable. Both Respondents (a Company and an International Union) resist such determination, contending that the International Union was an indispensable party to requesting arbitration and its failure to request same (indeed, its adamant refusal) defeats the Local Union's claim for arbitration, despite the fact that the only act which can be attributed to the International Union is that it, in addition to the Local Union, signed the agreement, but then only "on behalf of" the Local Union. The Court of Appeals, in addition to resolving the merits, held that the Local Union did not follow the grievance procedure in that the International Union did not join in the final steps of same. Respondents would argue that the variance here is one of substance instead of procedure and hence a court rather than an arbitrator should make the initial determination. Admittedly, as this Court pointed out in *Wiley*, there are areas which cannot be fitted into either a substantive or a procedural cubbyhole. We believe, however, that the issue here is one of pure procedure. After all, the Local Union administered the contract, selected its own grievance committee, and the International's role in the administration of the contract was purely advisory—if that. An analysis of the record reflects complete compliance with the procedural steps insofar as the Local Union was concerned, and it would seem that since the subject matter of the grievance is clearly arbitrable, the matter is appropriately left for an arbitrator to resolve along with all of the facets of the case, perhaps paying particular attention to the question of why the International Union adamantly resisted and resists arbitration when the plant is no longer in existence and there is no continuing bargaining relationship—all that remains to be determined is the rights of the employees under the now expired contract.

In support of their position that the matter is not procedural the Company cites and quotes from *Atkinson* v. *Sinclair Refining Company*, 370 U. S. 238, 241 (1962) (Co. Brief, pages 7-8). From the context of the quote, however, and from the Court's reference immediately following to *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960) it is apparent that this Court, in stating that it was the Court's function to determine whether a company was bound to arbitrate, was referring to determining whether the subject matter was arbitrable. Thus in *Atkinson* this Court determined that the collective bargaining agreement did not encompass the arbitration of an employer's damage claim for breach of a collective bargaining agreement. In the instant case, however, neither Respondent contends that the subject matter is outside the coverage of the arbitration clause. The parties' only dispute is whether all of the steps of the grievance procedure have been adequately followed.

But even assuming *in arguendo* that the issue here is a substantive one, the Court below nevertheless refused to heed the admonishment of *Warrior and Gulf* that every presumption is to be taken in favor of arbitrability. Here District 50 entered into the agreement "*on behalf of* Local Union No. 12405 (hereinafter referred to as the 'Union')" (App. 14) (Italics supplied). The Local, a signatory to the agreement (App. 33), administered the agreement by itself, with rare occasional advice from District 50. Contract demands were formulated by the Local and it directed the negotiations with the Company. Moreover, it was the membership of the Local which ultimately voted to accept or reject the Company's contract proposals. Clearly, at best, District 50 was an agent of the Local. At a minimum, under the guidelines of *Warrior and Gulf* and its successors,

as a signatory to the agreement, the Local could refer a grievance to arbitration.

The Company and District 50, rather than meet the issues presented by the Petitioners, have seen fit to attempt to camouflage the very clear facts of this case, to be inaccurate and to attempt to mislead. First, with respect to Petitioners' contention that a conflict exists between the Court of Appeals' determination that "District 50 was the sole collective bargaining agent" and the National Labor Relations Board's determination that the Local was also a party to the agreement, the Company unqualifiedly asserts, "No finding was made by the Board, or *by any Board agent*, that the Local was a party to the 1961 contract. . . ." (Italics added). This statement is untrue, and well below the dignity required of an officer of this court. Unsworn, it directly contradicts an affidavit of one of Petitioners' counsel presented to the district court in support of a motion for a new trial (App. 256-257). Petitioners were informed by a Regional agent of the National Labor Relations Board that the General Counsel's office in Washington had determined that the Local is a party to the collective bargaining agreement and that the Board was prepared to issue a refusal to bargain complaint against Respondent Company (App. 256-257). Furthermore, Respondent Company is aware of this because the only reason complaint did not issue is that the Company informally agreed, at the request or suggestion of the Regional Director of the National Labor Relations Board, to write the Local offering also to bargain with it. A copy of said letter appears herein as Appendix A. And that is the reason the Regional Director stated in his letter refusing to issue complaint, "Investigation of this matter reveals that the Company has unconditionally offered to meet and bargain, upon request, with representatives of District 50 . . . and its Local Union No. 12405. . . ." As for

the letter from the appeals office of the General Counsel, quoted at page 6 of the Company's brief in opposition, that letter did no more than sustain the Regional Director's informal disposition of the Board proceedings. Clearly, the letter was not intended to express approval of the Court of Appeals decision but was merely a recognition that there was no practical point (particularly in view of the Regional Director's informal disposition) in proceeding further in the limited 8 (a)(5) area, since any possibility of enforcement of a contrary Board order in the Seventh Circuit would be highly unlikely.

As for Respondents' contention that *Wiley* is inapplicable because "*Wiley* involved a merger wherein all predecessor obligations were assumed by the surviving entity" (Company Brief, page 7), clearly there is no merit. Here the Company to which the operations were transferred is neither a predecessor nor successor—it is the same company. On the basis of *Wiley*, *a fortiori* the instant matter is arbitrable. Nor is there any merit to the Company's contention that the failure to join the other two unions at the new plants is an obstacle to arbitration. First, an arbitrator may well see fit to award only monetary compensation and there would thus be no need to involve any other unions or anyone else. Secondly, in *Carey* v. *Westinghouse Electric Corporation* 375 U. S. 261 (1964), this Court held that the failure of both unions involved to join in a grievance protesting an employer's work assignment did not bar a court's direction of arbitration of the grievance because "the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it."

District 50 in its brief attempts to categorize the instant matter as a dispute between individual employees and their collective bargaining agent as to whether or not to refer a particular grievance to arbitration. Such is not the case.

We do not even reach the question of whether individual employees may refer a grievance to arbitration. Here the Local Union itself—a party signatory to the collective bargaining agreement—referred the matter to arbitration. All of the individual employees affected joined in the grievance and in the referral to arbitration. Now District 50 contends that the reference was improper because of certain policy considerations. For example, it contends, "A prime function of a grievance procedure is to secure uniformity in interpreting the agreement and building up a 'law of the plant'" . . . (page 8). Also, "In grievances arising out of problems not foreseen at the time of contract negotiations, although the issue is nominally framed by the past, the important question is often what rule shall govern the parties' conduct in the future." (Page 8). Or, "The group may be affected by future implications of the ruling to an extent that far outweighs the individual's claim for damages. . . ." (page 8). And so on with self righteous platitudes that may have some cogency in a continuing bargaining relationship where an individual seeks something that the group may or should oppose. But what place have such considerations here where the plant has been closed, where no one now contends that it should be reopened, and where the Local Union itself—and not individual employees—has referred the matter to arbitration, with the unanimous approval of all of the employees affected?

One can only wonder at District 50's motives. Not only has it actively resisted the Local and its members at all stages of these proceedings, but even now, before this high court, without any basis, it accuses the Local of inaccuracies and misrepresentations when, in reality, it and not the Local is guilty of these improprieties. Thus it charges Petitioners with "tak(ing) unwarranted liberties with the record." (District 50 brief, p. 2). Its first example, however, reveals

the inaccuracy of its statement and sets the tone for the remainder of its brief. It takes a partial quotation from page 6 of the Petition and erroneously asserts that the appendix citations not only do not support the quotation but negate it. If District 50 had been more discerning it would have noted that the record citations were intended to and do support that part of the quotation which District 50 omitted from its brief. The full quotation is as follows:

> "It (the Company) kept, however, from the Local the fact that a substantial portion of the operations was being transferred to the Company's other plants (App. 84, 87, 89-90)."

All of the pages cited support the assertion that the Company *kept from the Local* the fact that it was transferring a part of its operations. But, there is a deeper significance here. These slanderous and uncalled for remarks intended to injure the Local before this tribunal reveal the true nature of the opponent the Local is facing and the impurity of its motives. For if Respondent District 50 were interested either in the truth or in serving its members, candor would require that it cite to this Court the actual appendix citations which confirm what even Respondent Company does not deny, namely, that a substantial portion of the Company's operations were transferred to two of its other plants. Thus on pages 152-153 of the Appendix appears the following stipulation entered into at the trial between the Company and Petitioners:

> "Now, I propose also that the company transferred the following pieces of machinery and equipment which had been in operation in its Chicago Heights plant to its plants at either Jackson, Michigan, or St. Louis, Missouri:
>
> "And as I read each item of equipment, I will read the particular city to which transferred.

"A 4-inch Bonnot extruder and the winder. This was first transferred to Jackson, Michigan and, then re-transferred to St. Louis, Missouri; a lab mixer transferred to the St. Louis plant; a pug mixer transferred to the St. Louis plant; a Clark fork truck transferred to the St. Louis plant; a heavy-duty Baker-Perkins mixer transferred to the Jackson, Michigan plant; a Ford cold slam jog transferred to Jackson, Michigan; an Oven Precision Scientific transferred to Jackson, Michigan; a greaseworker, a piece of equipment transferred to Jackson, Michigan; a Shore Durometer transferred to Jackson; a deep freeze minus 20 degrees Fahrenheit transferred to Jackson; a portable screener and an accumulator transferred to Jackson; another 4-inch Bonnot extruder—this is in addition to the one earlier read—transferred to Jackson; another winder transferred to Jackson; miscellaneous factory supplies also transferred to Jackson.

"Then there was lab supplies and office equipment transferred to St. Louis. ...

"A curb and gutter slitter transferred to St. Louis, Missouri; a punch press and table transferred to St. Louis; slitters transferred to St. Louis, and equipment for production of the old 336 Department, which has now been renumbered 237.1 Department, which included a mixer and two blenders. This went to St. Louis.

"A Penetrometer went to St. Louis; a 77 degree water bath and scale went to St. Louis. And then, there additionally are miscellaneous factory supplies listed which mean another shipment to St. Louis; a Hyster, which is a fork truck, went to Jackson, Michigan; a Clark truck went to Jackson, Michigan; and all of the items in the Center Strip Department went to St. Louis just last Friday, on December 21st.

"And they included a slitter, a punch press, a forming press, dies, and related items.

"That concludes the proposed stipulation.

—

"Mr. O'Shaughnessy: Your Honor, I have agreed, for purposes of expediting the hearing to these facts."

Nor is District 50 any more accurate in its statement at page 3 of its brief that "Petitioners misrepresent the record in stating on (p. 7) that the 'grievance' complained 'about the Company's . . . transferring operations.'" Although the grievance (App. 35-37) does not mention the word "transfer" it does speak of "terminat(ion) of operations" and "the right of relocation" and the payment of "relocation expenses". Obviously, if the grievance referred to permanent cessation rather than mere transfer, there would be no reason to request relocation.

In sum, no one contends that the subject matter of the instant dispute is outside the coverage of the arbitration clause. The sole point in issue is whether all of the steps of the grievance procedure were properly followed—a type of dispute which Wiley has defined as procedural and to be determined by an arbitrator and not by a court. But even if such a dispute were to be considered substantive, under the guidelines of *Warrior and Gulf* and later cases, the dispute is clearly arbitrable.

We are not unaware of the Court's case load. While perhaps an over-simplification—the growth of our country as regards some facets of our lives has probably created a dichotomy with other facets which have been more resistant to change. Judicially, this has resulted in a substantial case load of matters important to our society and culture. The issues presented here fall into this generic category, but we are not presumptuous enough to suggest that they are important to the country as a whole. *Wiley* will carry the country for a long time—but not the entire country, for the Seventh Circuit has been isolated. And this isolation has been made clear when one views the instant matter and the

Kimball case (June 30, 1964) *cert. applied for*, App. Docket No. 535, October, 1964. Without a clear expression from this Court, situations will be rationalized and articulated in terms of tenuous theories to defeat the protections afforded employees under a collective bargaining agreement when an employer sees fit to transfer his plant and ignore the seniority rights of his former employees. Here, the Seventh Circuit seized upon the shameful alliance District 50 made with the Respondent Company. But, this alliance does not form the basis of the result. It was but a convenient detail utilized to defeat arbitration. We suggest that any detail would have been sufficient. Right or wrong the Seventh Circuit refused emotionally to embrace, let alone logically follow, the concept that a collective bargaining agreement may generate valuable rights for employees which a company must honor at least by resolving differences in arbitration. In this frame, then, this case is important. Territorially, it is important to those within the confines of the Seventh Circuit. We need this Court's assistance.

Respectfully submitted,

BERNARD M. MAMET,
Suite 1326,
327 South La Salle Street,
Chicago, Illinois 60604,
HArrison 7-7630.

Attorney for Petitioners.

Chicago, Illinois,
October 12, 1964.

APPENDIX A.

MARTIN MARIETTA CORPORATION
101 East Ontario Street
Chicago 11, Illinois

March 11, 1963

Mr. Joseph Piunti
125 Rose Street, Box 35
Glenwood, Illinois

SUBJECT: MARTIN MARIETTA CORPORATION
CASE NO. 13-CA-5284

Dear Mr. Piunti:

In response to your letter of March 8, 1963 to our attorneys, I wish to assure you that Martin Marietta will meet and bargain, upon request, with the representatives designated by District 50, United Mine Workers of America, and by its Local Union No. 12405, whoever they may be, including Mr. Mamet.

Kindly arrange a suitable time and place.

Very truly yours,

MARTIN MARIETTA CORPORATION

(s) Warren A. Furst

Warren A. Furst
Director of Personnel
and Industrial Relations
Construction Materials Division.

WAF-GH

cc: Ross M. Madden
National Labor Relations Board — Chicago

Bernard Mamet
427 S. LaSalle Street (sic) — Chicago

Harold J. Bowers
District 50, UMWA — Chicago

Herbert C. Loth, Jr.
135 S. LaSalle Street — Chicago

J. B. O'Shaughnessy
231 S. LaSalle Street — Chicago

C. E. Cosby
Presstite Division — St. Louis